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NTSB Order No. EA-5105

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 26th day of July, 2004

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MARION C. BLAKEY)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Dockets SE-16583
)	and SE-16590
)	
LOWELL G. PATE and)	
LEANNA J. YODER,)	
)	
Respondents.)	
)	
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OPINION AND ORDER

Respondents appeal the written initial decision of Administrative Law Judge William R. Mullins, issued on October 29, 2002.¹ By that decision, the law judge affirmed the Administrator's Orders of Suspension charging violations of sections 91.123(b) and 91.13(a) of the Federal Aviation Regulations (FARs) and imposing, respectively, a 15-day and 7-day

¹ A copy of the law judge's decision is attached.

suspension against respondent Pate's and respondent Yoder's Airline Transport Pilot certificates.² We grant the appeal.

Prior to the hearing, respondents admitted all factual allegations in the Administrator's Orders of Suspension. Briefly, on May 19, 2000, respondent Pate was pilot-in-command and respondent Yoder was second-in-command of United Airlines Flight 1711, a Boeing 737-522. As Flight 1171 approached Cedar Rapids, Iowa, its destination, Flight 1171 was instructed to, and did, descend to and maintain 2,500 feet.³ Subsequently, Flight 1171 was instructed to turn to a heading of 50 degrees.⁴

² FAR sections 91.123 and 91.13, 14 C.F.R. Part 91, provide, in relevant part, as follows:

Sec. 91.123 Compliance with ATC clearances and instructions.

* * * * *

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

* * * * *

Sec. 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

* * * * *

³ It appears from the record that respondent Pate was the pilot-flying, and respondent Yoder was the pilot-not-flying during the relevant time period.

⁴ During maneuvering, and prior to the incident, Flight 1171 was assigned various headings (more than usual, perhaps, because for a time the primary runway was closed because of a mishap).

However, Flight 1171 turned to a heading of 250 degrees and climbed to 3,000 feet. As a result, there was a loss of "standard separation" when respondents' aircraft came within 500 feet vertically and two and one-half miles laterally of another airliner, Trans World Airlines Flight 541.⁵ Upon a joint motion filed by the parties, the case proceeded without a hearing, and, after the parties submitted briefs, the law judge reviewed the Administrator's Orders of Suspension only as to respondents'

⁵ The ATC transcript, verified by respondents as accurate, is a part of the record. At the relevant time period, according to the transcript, Flight 1171's last assigned altitude was 2,500 feet and the last assigned heading was 360 degrees. Thereafter, the following exchange occurred:

CID Apch -- 1171, roger, plan runway 13, I'll tell you what, make the heading 050, I'll bring you up on a left downwind at 13.

UALA 1171 -- OK, 050.

CID Apch -- United 1171, they just said runway 9's available. I guess you probably want to stick with that? 2500 on the altitude.

UALA 1171 -- Yeah, we'll do that.

CID Apch -- 1171, roger. What heading are you on.

UALA 1171 -- Just turned left here. We'll come, we'll, I'll tell you what. Let's go to Cindy [intersection], we'll do a right 270 and land that way, OK.

CID Apch -- That's fine with me, and just to verify, your traffic 2 o'clock and 3 miles, you're at 2500, right?

UALA 1171 -- Ah, we're going back down to it [sic] little bit.

CID Apch -- And you got that traffic in sight?

UALA 1171 -- I don't have him but we're going back down to 2500.

"affirmative defense of entitlement to waiver of sanction."

Before the law judge, respondents argued that Administrator v. Brasher, 5 NTSB 2116 (1987), requires that no sanction be imposed for the FAR violations because Air Traffic Control ("ATC") personnel did not provide a timely "deviation" notice.⁶ Respondents also argued that ATC's failure to provide a deviation notice precluded them from taking advantage of the sanction waiver benefits of filing a report pursuant to the Aviation Safety Reporting System ("ASRS").⁷ The law judge rejected these arguments, and affirmed the Orders of Suspension.

On appeal, respondents essentially repeat the Brasher

⁶ Respondents cite to paragraph 2-1-26 ("Pilot Deviation Notification") of FAA Order No. 7110.65M ("Air Traffic Control") which states: "When it appears that the actions of a pilot constitute a pilot deviation, notify the pilot, workload permitting. Phraseology - (Identification) POSSIBLE PILOT DEVIATION ADVISE YOU CONTACT (facility) AT (telephone number)."

⁷ Respondents' July 2, 2002 Amended Answer and Affirmative Defense to the Administrator's complaint admitted all numerated factual allegations, and premised their "affirmative defense" on the "Brasher doctrine." In doing so, respondents specifically complained that "[a]s a direct consequence of the controller's failure to comply with the Administrator's notice requirement ... respondents failed to avail themselves of the immunity protections available under the [ASRS]." The purpose of the ASRS is not to grant immunity. Cf. Brasher at footnote 8 (1987) ("we take note of the assertion of the Administrator ... that the purpose of immediately notifying pilots of possible deviation is not to allow that pilot to file a timely report under [ASRS] and thus gain the immunity conferred by that program"). Were ASRS the only basis for respondents' appeal, it would fail. However, we accept, over the objections of the Administrator, respondents' counsel's assertion on appeal that respondents "elected to admit the facts alleged ... but relied on the Board's well-established Brasher doctrine as an affirmative defense because their ability to defend their actions had been prejudiced by the FAA's failure to timely notify them of any deviation." Respondents' Brief at 2.

argument they raised before the law judge. The Administrator urges us to uphold the law judge's decision.

Our review of Brasher, and the other cases cited by the parties that resolved similar issues of ATC notice, establishes that a failure by ATC to provide a required notice of a deviation generally requires that sanction be waived for the associated FAR violation. See, e.g., Administrator v. McIntosh & Spriggs, NTSB Order No. EA-4174 at 12 (1994) ("the remedy for non-compliance with the [ATC] notice requirement is to impose no sanction for the violation, not dismissal of the charges") (internal citations omitted).

On April 30, 2004, the parties were asked to provide supplemental information about "[w]hether, at the time of the incident in the subject appeal, there was any published guidance or requirement concerning Air Traffic Control ("ATC") notice to pilots observed to have deviated from a clearance or instruction." The parties were also instructed to provide information about "the current status of the notice of deviation policy discussed in [Brasher], any superceding provision or policy if that one is no longer extant, and any regulatory or administrative history applicable to the issue."

The supplemental information provided by the Administrator indicates that the ATC notification requirement (FAA Notice N7210.251) cited in Brasher is substantively the same as the ATC

notification requirement set forth in the ATC manual that was in effect on May 19, 2000 (FAA Order 7110.65M).⁸

The Administrator provides no cognizable basis to depart from the central holding of Brasher that the pilot deviation notice provisions "prescrib[e] a duty, ... imposed on FAA employees and instituted, at least in part, for the benefit of pilots." Brasher at 2118. And, as we observed in Brasher, the Administrator specifically informed the pilot community that at least one of the purposes of the deviation notification procedures is to permit pilots to prepare a response to allegations of an ATC clearance deviation. The Administrator has not shown that this guidance has been rescinded (particularly in light of the consistently-similar phraseology specified within the FAA publications).

In view of the foregoing, we hold that respondents were

⁸ The notification provisions in Notice N2710.251 cited in Brasher applied to the Facility Operation and Administration publication (FAA Order 7210.3), a document that provides "administrative guidance to Air Traffic supervisory and management personnel," and, until 1995, the ATC manual did not contain any notification requirement. See Declaration of Luis A. Ramirez, FAA Director of En Route and Oceanic Safety Operations Support. Before Notice N7210.251 expired, however, the FAA incorporated its pilot deviation notification procedures into the Facility Operation and Administration publication in 1986. Id. And, when pilot deviation notification procedures were first added to the ATC manual in 1995, the procedure and phraseology were substantially similar to the pertinent provisions of Notice 7210.251 and the Facility Operation and Administration publication; indeed, the notification provision in Notice N2710.251 differs slightly from the provisions in FAA Order 7210.3 and the ATC manual, in that the latter contain the caveat "work load permitting." Id. The pilot deviation notification procedures in the version of the Air Traffic Control manual applicable on May 19, 2000 is substantively identical to the original provision added in 1995. Id.

entitled to a waiver of sanction under the rationale of Brasher because they were not notified of an ATC deviation in accordance with the provisions of paragraph 2-1-26 of the ATC manual.⁹

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeal is granted;
2. The law judge's decision as to sanction is vacated; and
3. The Administrator's Orders of Suspension are affirmed, but sanction is waived.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and CARMODY, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.

⁹ We disagree with the Administrator's contention that the controller complied with the deviation notice provision when he queried respondents about their heading and altitude. Such inquiries do not provide the information required by the notice. To the extent that our opinion and order in Administrator v. Palmquist, 6 NTSB 476 (1988), suggests otherwise, it is overruled.